APPENDIX C

[Filed May 23, 2002]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JACKSON CHAMBERS DANIELS, JR.	)	CASE No. CV-92-4683 JSL
Petitioner,	)	ORDER ON PETITION FOR WRIT OF HABEAS CORPUS
v.	)	GRANTING RELIEF WITH RESPECT TO DEATH
JEANNE WOODFORD, Warden, California State Prison at San Quentin	)	SENTENCE AND DENYING RELIEF WITH RESPECT TO GUILT PHASE CLAIMS
Respondent.	)	

Petitioner Jackson Chambers Daniels, Jr., has filed a petition for writ of habeas corpus (the "Petition") with this Court challenging (1) his convictions for the first-degree murders of Riverside Police Officers Dennis Doty and Phil Trust and (2) his death sentence. The Court hereby GRANTS the petition with respect to the death sentence because Daniels' Sixth Amendment right to assistance of counsel was violated at the penalty phase and because the cumulative effect of the multiple errors that occurred throughout the proceedings so infected the proceedings with unfairness as to make the death sentence invalid. Although these serious and egregious errors were

committed from the beginning of the case, the court does not believe that they affected the outcome of the guilt phase. Accordingly, the petition is DENIED with respect *to* the guilt phase claims.

I. Background

A. Factual Background

On December 1, 1983, Daniels was convicted of two counts of first-degree murder. The jury also found the special circumstances allegations of (1) multiple murder, (2) that the murders were committed to avoid lawful arrest, and (3) that the victims were police officers engaged in the performance of their duties. Because the jury found at least one special circumstance, Daniels was eligible for the death penalty and was sentenced to death on January 31, 1984.[1]

At trial, evidence was presented showing that in 1980, Daniels committed a bank robbery and was shot while fleeing. As a result of this shooting, Daniels was paralyzed from the waist down and thereafter was confined to a wheelchair. Daniels was convicted of the bank robbery and appealed the conviction. While his appeal was pending, Daniels posted bail and remained at liberty.[2] Daniels' appeal was denied. After he failed

---

[1] Under California Penal Code § 190.3, a finding of just one special circumstance renders a defendant who has been convicted of first-degree murder eligible for the death penalty.

[2] During this time, Daniels was arrested by a Riverside police officer who was given false information that a warrant had been issued for Daniels' arrest. As a result of what transpired while in custody, Daniels filed a claim with the City Council of the

to appear at two hearings following this denial, a warrant for his arrest was issued.

The testimony at the trial for the present offenses indicated that Daniels was staying at the home of James Cornish on May 13, 1982, when Riverside Police Officers Dennis Doty and Phil Trust went to the Cornish residence to arrest Daniels. Renee Ross, Daniels' attendant,[3] testified that she let the officers into the Cornish residence at approximately 8:30 a.m. and took them to Daniels' bedroom. Daniels was sitting on the bed dressed only in a shirt. Ross went to a closet to get Daniels some clothes. Ross looked back and saw Daniels take a gun from between his legs. Ross immediately hid in the closet and heard gunshots.

Ross testified that a few minutes later, she came out of the closet and saw Daniels sitting on the floor with his back against the bed; he had been shot in the right hand. Officer Doty was lying on the floor. Daniels picked an unidentified gun up off the floor and with Ross' assistance got into his wheelchair. As they left the house, Ross saw Officer Trust, mortally wounded, kneeling on the floor of a bedroom.

City o Riverside seeking money damages and alleging that he had been assaulted and deprived of medical care. Declarations submitted in support of his federal habeas petition described Daniels' fear of being taken into custody and mistreated again.

[3] Ross, who was nineteen at the time of the murders, met Daniels through her brother, who also was a paraplegic. Ross had experience caring for her brother and needed extra money, so she agreed to assist Daniels. On May 13, 1982, the day of the shootings, Ross had been working for Daniels for only four or five days.

Ross testified that at Daniels' direction, she drove him to Delorse Butler's house. On the way to Butler's house, Daniels told Ross that he had to pay them back for what they did to him. He told her that the police previously had shot him nine times. Daniels also called the police "mother fuckers". When confronted by Butler, Daniels told her, "Yes, I killed them." It was "either them or me." Daniels eventually fled to Ted Smith's house. Smith testified that Daniels told him that, when one of the officers went to get some clothes for him, he "saw his opportunity and took it." Daniels said that he shot one officer, then the other shot the gun out of his hand. Daniels told Smith that he fell to the floor, got the first officer's gun, and shot the other officer.

Ballistics evidence showed that Doty had been shot three times with an unidentified gun. Trust had been shot six times, primarily with Doty's gun. Trust had fired four bullets from his gun. Three were recovered *in* the house and the fourth in Daniels' hand.

B. Procedural Background

Daniels' convictions and sentence were affirmed on direct appeal [4]. Daniels filed a habeas corpus petition in the California Supreme Court, which was denied on July 22, 1992.

Daniels filed a federal habeas corpus petition on October 22, 1992. On April 30, 1993, Daniels filed a motion for an

---

[4] People v. Daniels, 52 Cal.3d 815, 277 Cal. Rptr. 815 (1991).

evidentiary hearing. On July 1, 1999, the Court granted an evidentiary hearing on Claim C(3) and C(4), Daniels' claims that his attorneys were ineffective for failing to investigate his mental impairments at the penalty phase and failing to rebut the state's expert.[5] The court held the evidentiary hearing on February 24 and 25, April 10, and November 2, 2000.

II. THE DEATH SENTENCE IS INVALID UNDER THE SIXTH AMENDMENT

The court holds that the that the death penalty imposed on Daniels is invalid because an "irreconcilable conflict" with his trial counsel deprived Daniels of his Sixth Amendment right to counsel,[6] and because he was deprived of his right to effective assistance of counsel.[7]

---

[5] A substantial amount of time passed between the filing of Daniels' federal habeas petition and this court's granting of an evidentiary hearing. The court notes that its first review of Daniels' petition led it to conclude that the petition was without merit. Having made that determination, the court directed the capital habeas staff attorneys to produce a draft of the court's denial of the writ. Because of the multiplicity of claims of error in death penalty cases, the denial of a death penalty habeas petition demands considerable time. When the court reviewed the draft, the court realized that Daniels' petition actually appeared to have merit. The court, therefore, granted the evidentiary hearing.

[6] See Schell v. Witek, 218 F.3d 1017, 1025-26 (9th Cir. 2000) (an "irreconcilable conflict" exists when the conflict between the defendant and his attorney has "become so great that it result[s] in a total lack of communication or other significant impediment" that results in turn in an attorney-client relationship that prevents the attorney from being able to provide adequate assistance).

[7] See Strickland v. Washington, 466 U.S. 674, 685, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The court conducts a separate analysis of the two Sixth Amendment claims in order to provide a complete record for appeal. See, e.g., Schell, 218 F.3d at 1028 (remanding and directing the district court, in the interest of judicial economy, to decide both the ineffective assistance of counsel and irreconcilable conflict claims).

Claims of irreconcilable conflicts between counsel and client and claims of ineffective assistance of counsel usually are analyzed separately under the Sixth Amendment. These normally distinct analyses are to some extent combined herein because communications between Daniels and his trial counsel were doomed from the outset of the appointment. From the beginning, trial counsel's representation of Daniels was marked by a lack of trust that resulted in a total failure of communication. Later, it became marked by unreasonable strategic decisions, and finally it became marked by hopelessness and abandonment. Because his trial counsel was never able to cure the total lack of communication, Daniels was denied the right to counsel guaranteed by the Sixth Amendment.

A. Denial of Right to Counsel

1. Overview

It was clear from the outset that the government's case left Daniels without any remotely credible basis for raising a reasonable doubt as to whether he killed the police officers or as to any of the three special circumstances. According to Ross' testimony Daniels drew an "unidentified" gun immediately before the shooting began and picked up an "unidentified" gun immediately afterward. Daniels confessed three times to killing the officers *in* the presence of three different witnesses, and he, himself, was shot by Officer Trust. Both Doty and Trust were police officers engaged in the performance of their duties, the

murders were multiple, and they were committed to avoid a lawful arrest.

In light of the basically incontrovertible evidence establishing guilt and the three special circumstances that would render Daniels eligible for the death penalty, the only reasonable object of Daniels' defense from the beginning was to try to avoid the death penalty. Any defense based on an effort to avoid guilt entirely not only was sure to fail, but it would also make defending against the death penalty more difficult.

No matter how the guilt phase was approached, however, to avoid state's evidence suggested that the officers were killed while performing what should have been the routine task of escorting someone to prison after his bail had terminated. Partly because of the tragic circumstances of their deaths, the officers were regarded as heroes in the Riverside community.

Daniels, on the other hand, had become a pariah in the community. The officer killings had received wide-spread and almost continuous publicity, and Daniels had been identified as the alleged killer from the beginning.[8] No one ever publicly

---

[8] See Daniels, 52 Cal.3d at 849. One newspaper article said "Police were deluged with calls giving tips for investigation and offering to contribute to a memorial fund. 'People are really, really upset about it,' said one officer; another described the 'tremendous community response.'" Id. at 849-50. Newspapers printed numerous letters "calling for the execution of the killer." Id. at 850. The media coverage also recounted prior criminal activity by Daniels that was not admissible at the guilt phase of the trial. Id. Due in part to this media coverage, the victims "became posthumous celebrities," as evidenced by the fact that approximately 3,000 people attended the funeral held for Doty and Trust. Id. In addition, approximately one month before the trial began, a nine-foot statue dedicated to fallen police officers was erected across the street from the courthouse where Daniels was tried. "Although the statue

advanced any reason to believe Daniels was not the killer or that he had any reason for the killings other than the simple desire to escape being brought to justice. Moreover, Daniels had a long criminal record of serious offenses, at least one of which involved shooting at a police officer. Even the fact that Daniels was confined to a wheelchair did not make him sympathetic, since the injuries that caused him to be so confined were sustained in a previous attempt to escape from the police.

This was not a case in which there was any likelihood that the jury would resolve any lingering question of Daniels' guilt by refusing to impose the death penalty. It also was not a case in which the jury would be swayed by the defense's effort to show that, when Daniels was not committing crimes or shooting and being shot at by police officers, he was a relatively decent person. In these circumstances, it was a near certainty that, if the defense presented no credible mitigating evidence to seriously alter the thrust of the state's evidence, Daniels would be found guilty of first-degree murder with at least one special circumstance and would be sentenced to death.

Without Daniels' life so clearly at stake, the need to be represented by counsel whom he trusted, in whom he would confide, and with whom he would discuss his situation in a candid and unguarded fashion was of the utmost importance.

---

commemorates all such officers, the publicity attending its unveiling referred largely to officers Trust and Doty." Id. The prosecutor, in fact, referred to it in his summation: "The monuments that we build to these people are appropriate, 'Lest we forget.'"

2. Factu[illegible]istory of Representation[9]

Through the proceedings, the counsel with whom Daniels had a relationship of trust and confidence was an attorney named Andrew Roth. Roth was an established, well-regarded Riverside County criminal lawyer. He had been appointed by Riverside County courts to represent Daniels on prior occasions, including Daniels' appeal from his 1980 robbery conviction. As shown by his behavior over the course of the case, and as described by Daniels, Roth had an abiding concern for Daniels' welfare. He accompanied Daniels to his arraignment for the murder charges, and when Daniels express the strong desire to have Roth's continued representation, Roth advised the trial judge that he was available.

The trial judge, however, initially had appointed the Public Defender to represent Daniels. At the arraignment for the murder charges, Daniels made a motion to substitute Roth as his counsel, and the trial judge held an in camera hearing on Daniels' motion. Present at this hearing were Daniels, Roth, and a deputy public defender appearing on behalf of Daniels. Daniels told the trial judge that he had a conflict of interest with the Public Defender's Office, that he had a long history of misunderstandings with lawyers from that office, that he could not communicate with them, and that they could not represent him properly. The conflict to which Daniels referred arose out

---

[9] The court provides a detailed account of the history of Daniels' representation in order to ensure a complete record for appellate review

of the Public Defender's Office's handling of Daniels' trial level defense of his 1980 robbery case. While negotiating a plea agreement for Daniels, his public defender was simultaneously negotiating on his own behalf for employment with the District Attorney's office. After executing the plea agreement, his public defender went to work for the District Attorney, and a new public defender was assigned to represent Daniels at sentencing. Neither the new public defender nor the prosecutor advised the judge of a clause in the plea agreement that provided that Daniels was to be released for treatment of the injuries that had rendered him a paraplegic rather than be incarcerated. As a result, Daniels was incarcerated until Roth, who handled Daniels' appeal, was able to have him released on bail pending the outcome of the appeal.

During the in camera hearing on Daniels' motion, the deputy public defender informed the trial judge that Daniels had filed a federal habeas petition claiming that the public defender who represented him in his 1980 robbery case had provided him with ineffective assistance of counsel. The deputy public defender also advised the trial judge that Daniels did not trust the Public Defender's Office and would not cooperate with it, but she declined to declare a conflict at that time because she had yet to determine whether Daniels' federal habeas petition challenging his 1980 robbery conviction was still pending.[10] Because

---

[10] Post-trial affidavits revealed that the Public Defender insisted upon declaring

evidence of the robbery would be admissible in the penalty phase of the murder case, the deputy public defender representing Daniels at the penalty phase would be obliged to argue that its office had provided Daniels with ineffective assistance of counsel in connection with the robbery conviction while simultaneously defending the conviction in federal court if the habeas petition was still pending.

In addition, Roth informed the trial judge that he and Daniels had a long-standing and excellent relationship. The trial judge, however, denied without prejudice Daniels' motion to substitute counsel, in spite of Daniels' express desire to be represented by Roth, Roth's availability, and Roth's demonstrated competence and qualification for appointment.

Following the arraignment on the murder charges and the hearing on Daniels' motion to substitute counsel, Deputy Public Defender Robert Keller was formally assigned to represent Daniels. Roth, a friend of Keller's, had urged him to take on the representation, and Roth had convinced Daniels to allow Keller to work on his case. Keller agreed to the assignment, although he believed that there was an "obvious" conflict in his representation of Daniels and asked the Public Defender to withdraw from the case. With Keller as the counsel of record, Roth, who had succeeded in persuading Keller to work on the case by promising to work on it himself on a pro bono basis,

---

conflicts himself and refused to declare one in Daniels' case.

took responsibility for communicating with and advising Daniels with respect to any tactical or legal decision. Keller later described Roth as doing "substantially more work" on Daniels' behalf than Keller did during this period.

After working on Daniels' capital case on a pro bono basis, Roth was appointed as co-counsel on October 15, 1982. Approximately one month later, however, the prosecutor moved to have Roth removed from the case, asserting that he intended to call Roth as a witness at trial. The prosecutor claimed that Roth's testimony regarding whether he had advised Daniels that his appeal of his 1980 robbery conviction had been denied and whether he had told Daniels to surrender himself or to appear in court was material to the issues of premeditation, deliberation, and malice aforethought. Roth argued that calling him to testify would violate the attorney-client privilege and that evidence as to those issues was available by other means.[11] Notwithstanding Daniels' expressed willingness to stipulate that Roth had told him that the appeal had been denied and to appear in court on April 21, 1982, his waiver of all conflicts, and his request that Roth remain as co-counsel, the trial judge unnecessarily removed Roth.[12]

---

[11] Roth pointed to a declaration that Daniels signed on April 20, 1982, and offered in support of his federal habeas corpus petition challenging his 1980 robbery conviction. In the declaration, Daniels stated that his appeal was denied by the California Supreme Court. This declaration could have been admitted to show Daniels' knowledge in lieu of Roth's testimony.

[12] The trial judge appears to have granted the prosecutor's motion based on findings

For the next three months, the Public Defender was again sole counsel for Daniels. During this period, it did nothing of substance to prepare for trial. In December, 1982, Keller became too ill to continue with the case and was forced to withdraw. Two other deputy public defenders were assigned to replace Keller. Thereafter, on February 1, 1983, fully nine months subsequent to the date of Public Defender's appointment, these two new deputy public defenders submitted a memo to the new Public Defender outlining the conflict and recommending withdrawal. On February 23, 1983, the court allowed the Public Defender's Office to withdraw as Daniels' counsel based on the Public Defender's representation that there was a conflict.[13]

When the Public Defender belatedly declared the conflict, Roth, already having been removed from the case, was not considered as a replacement. Instead, the court appointed as Daniels' trial counsel ("Trial Counsel"), a lawyer who was just starting into private practice in Riverside County as a sole

---

that Roth was merely co-counsel and that Roth's testimony would not be privileged. The trial judge also appears to have been concerned that, if Roth was called to testify, his credibility would be placed in issue during the entire trial, which could undermine and even destroy Daniels' defense. The trial judge did not explain, however, why Roth's testimony as to undisputed facts would raise credibility questions and made no effort to learn why the testimony could not be stipulated.

[13] In this representation, the Public Defender's Office refused to disclose the specifics of the conflict. Without probing further, the court acknowledged that Daniels had been claiming that a conflict existed since the time of his arraignment. It was not until June 17, 1983, hearing on Daniels' motion to dismiss the case on the ground that he was denied counsel that Keller testified and revealed more fully the extent of the Public Defender's Office conflict.

practitioner. Trial Counsel was a former Riverside County prosecutor. He had some limited criminal defense experience, but his primary non-prosecutorial experience was in civil litigation. He accepted the Daniels appointment, his first appointment to handle a criminal defense matter, primarily in the hope that it might lead to future appointments.

As a sole practitioner with a new practice, Trial Counsel did not have the kind of legal and administrative resources necessary for the competent defense of a death penalty case. In addition, he had no experience whatsoever in dealing with the penalty phase of a death penalty case. In fact, he had never before even been involved in a death penalty case either as a prosecutor or as a defense counsel. As a result, Trial Counsel had no concept of the kind of pre-trial strategic planning necessary to deal effectively with potential death penalty issues both at the guilt phase of trial and in the limited time between the guilt and penalty phases of trial.

On April 1, 1983, the court acted to add to Trial Counsel's inadequate resources by appointing co-counsel ("Co-Counsel"). Co-Counsel had been practicing law for only two and one-half years. He too was a sole practitioner, and he had never been involved in any kind of homicide case.

Following Co-Counsel's appointment, Trial Counsel (Trial Counsel and Co-Counsel are hereinafter referred to collectively as "Counsel") was left with less than three months in which to do substantially all of the necessary investigatory work and

preparation for the guilt phase of trial. Co-Counsel undertook the task of drafting all pleadings and jury instructions, crafting all legal arguments, and preparing for the penalty phase in consultation with Trial Counsel. Even with Co-Counsel's help, Trial Counsel had neither the experience nor the qualifications to carry out such an undertaking in so short a time, even in the best of circumstances. In these particular circumstances, Counsel's efforts were completely hamstrung by the fact that Daniels viewed Trial Counsel's appointment as further proof that he was being intentionally deprived of fair representation so as to ensure his conviction and death sentence. As a result, Daniels refused to deal with Trial Counsel in any meaningful way. The court need not endorse this view to find that it was not unreasonable in the circumstances.[14] Trial Counsel, himself, understood why Daniels distrusted him, and considered it not unreasonable in the circumstances. Indeed, given the fact that not one substantive ruling was made in Daniels' favor during the entire course of the proceedings, Trial Counsel was so

---

[14] Daniels' counsel for his federal habeas petition correctly state that Daniels' long history of prison reports suggesting mental illness and the degree of Daniels' mistrust should have put Trial Counsel on sufficient notice so as to cause him to investigate Daniels' mental health and capacity to assist in his defense. Trial Counsel had been told by one psychiatrist, with whom Daniels had refused to communicate because he so severely mistrusted Counsel, that Daniels appeared to suffer from "paranoid ideation" but did not appear to suffer from a mental impairment to a degree that he could be absolved of responsibility for the shootings or would not be competent to stand trial. Despite this psychiatrist's admitted inability to communicate with Daniels and tentative diagnosis, Trial Counsel failed to pursue any follow up diagnostic examinations. The court notes, however, that it was not unreasonable for even a mentally sound person, given the circumstances, to view the proceedings and selection of counsel with mistrust.

convinced that Daniels was being denied a fair trial that, even before the penalty phase, he began to gear his defense toward a future motion for a new trial rather than toward a favorable result in the case at bar.[15]

Notwithstanding that nothing of substance had been done by Daniels' previous counsel to prepare the case in the nine months before Counsel filed a motion for a continuance, the trial judge denied the motion and retained the original trial date.[16] Trial Counsel again moved for a continuance before the penalty phase began. This motion was also denied. Following this denial, Counsel made a request for funds, including funding for mental health expert testimony. No funds, however, were granted until the trial had concluded and Daniels had been sentenced to death.

---

[15] The only difference between Daniels' and Trial Counsel's beliefs was that Daniels believed that Trial Counsel was part of this conspiracy.

[16] In any capital case, three months would be a very short time *in* which to prepare an adequate defense. In this case, because Counsel and client could not communicate at all, the shortness of time completely disabled the defense preparation process. The court's failure to grant the motions for continuances left Trial Counsel with little or no time in which to overcome Daniels' understandable mistrust and to develop a rapport that would enable him to prepare an adequate defense. At the hearing on Counsel's motion to continue, Daniels refused to waive time. Daniels' refusal reflects just how profound the communication failure was--Counsel could not even persuade Daniels of the importance of securing more time so as to adequately prepare.

3. Legal Analysis of Representation

Daniels claims that his Sixth Amendment rights were violated because there was a total lack of communication and a total breakdown of his relationship with his trial counsel.[17]

a. Applicable Law

The Sixth Amendment guarantees assistance of counsel, which is comprised of two correlative rights: "the right to counsel of reasonable competence, and the right to counsels undivided loyalty."[18]

When a criminal defendant claims that his counsel was not competent, or was "ineffective," the claim is analyzed under the standard established by Strickland v. Washinqton.[19] Under this standard, the criminal defendant must show that (l) counsel's actions were "outside" the range of professional conduct (the "performance prong"), and (2) but for counsel's error, there is a reasonable probability that the result of the proceeding would

---

[17] Daniels also claims that his Sixth Amendment rights were violated because he had an actual conflict of interest with the Public Defender's Office. See Faretta v. California, 422 U.S. 806, 821, 95 S.Ct. 2525, 2534, 45 L.Ed.2d 562 (1975). The California Supreme Court concluded that Daniels had not "shown any personal or professional relationship suggestive of a conflict of interest between the deputies actually representing him in this case and the departed deputy who had represented him in the. . . [1980] robbery trial." Daniels, 52 Cal.3d at 843. Because the court finds that an irreconcilable conflict existed between Daniels and Counsel, and because the court finds that these same lawyers provided ineffective assistance at the penalty phase, the court need not resolve this close question nor base its granting of relief under the Sixth Amendment on this claim.

[18] Frazier v. United States, 18 F.3d 778, 786 (9th Cir. 1994 (Beezer, concurring) (citing Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988)).

[19] 466 U.S. 668, 104 S.Ct. 2052.

have been different (the "prejudice prong").[20] Part of the performance prong standard is a requirement that counsel and client be able to communicate so as to permit counsel to develop an adequate defense.[21] Although the Sixth Amendment guarantees indigent defendants neither their choice of counsel[22] nor a "meaningful" relationship with counsel,[23] a court must substitute new counsel if the relationship between lawyer and client completely collapses or an irreconcilable conflict develops.[24] Substitution is required because "to compel one charged with a grievous crime to undergo a trial with the assistance of an attorney with whom he has been embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever."[25] When determining if a conflict is "irreconcilable," reviewing courts should consider whether "the conflict between [petitioner] and his attorney had

---

[20] Id. at 687. The Ninth Circuit recently clarified that a reasonable probability is less than a preponderance. See Visciiotti v. Woodfield, 2002 WL 663777, *8 (9th Cir. Cal. 2002).

[21] See, e.g., Frazer, 18 F.3d at 782 (the performance prong "contemplates open communication unencumbered by unnecessary impediments to the exchange of information and advice") (citations omitted); see also Brown v. Craven, 424 F.2d 1166, 1169 (9th Cir. 1970).

[22] See Caplin & Drysdale, 491 U.S. 617, 624, 109 S.Ct. 2646, 2652, 105 L.Ed.2d 258 (1989).

[23] See Morris v. Slappy, 461 U.S. 1, 3-4, 103 S.Ct. 1610, 1612-13, 75 L.Ed.2d 610 (1983).

[24] See United States v. Moore, 159 F.3d 1154, 1158 (1998); Schell, 218 F.3d at 1023.

[25] Moore, 159 F.3d at 1169 (emphasis added).

become so great that it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment."[26]

If the court finds that there was a "serious conflict" that "resulted in the constructive denial of assistance of counsel, no further showing of prejudice is required," and prejudice is presumed.[27]

b. Discussion

The lack of communication between Daniels and his counsel was so profound that it rendered Counsel completely unable to discover the basic information necessary to give fair consideration to how best to defend Daniels at the guilt phase or to develop any meaningful mitigation at the penalty phase.

In the penalty phase, the development of any meaningful mitigation would have to begin from Daniels' account of the relevant events and his explanation as to why they transpired as they did.[28] With even the barest minimum of communication, Trial Counsel could have persuaded Daniels at least to confirm

---

[26] Schell, 218 F.3d at 1026.

[27] Id. at 1027 (citing Strickland, 466 U.S. at 692). If, however, the "serious conflict did not rise to the level of a constructive denial of counsel, [the petitioner] would have to prove that he was prejudiced by the conflict." Id. at 1028.

[28] To give such an account would have required Daniels to waive his Fifth Amendment rights, which continued through appeal. In light of the overwhelming independent evidence against him, however, such a waiver would have been an insignificant sacrifice. As discussed infra, the record suggests that Daniels was indeed willing to waive his rights to testify.

and explain his three prior confessions and to address such questions as: What prompted Daniels to act as he did? Did he act entirely on the spur of the particular moment? If he had hoped to escape, why did he not leave during the weeks immediately after he learned that his appeal had been denied and before the officers arrived to return him to custody? When he did draw his gun, did he simply intend to induce the officers to drop their own guns? If so, did he ask the officers to drop their weapons? If not, did he expect the officers to try to draw their guns for the purpose of shooting at him?

In light of the evidence adduced at trial, it is obvious what the answers to these questions would have shown: when the officers entered the residence they had not drawn their weapons. "[Seeing] his opportunity," Daniels acted on the impulse of the moment and drew his previously concealed gun, very likely expecting that surprising the officers in this way would allow him to flee without actually having to use his gun. The officers, however, responded by going for their weapons, thereby producing a situation in which "it was either them or me," and the shooting commenced.

Exactly what Daniels might have said, or how he might have explained his actions, however, is not important. What is critical is that Trial Counsel was unable to get Daniels either to admit that he shot the officers or to provide any explanation whatsoever of the events.

Daniels' mere admission of the inescapable conclusion that he shot the officers, even without explanation but if coupled with an appropriate expression of remorse, would have permitted consideration and development of the standard means by which capital defendants are portrayed to the jury in a more sympathetic light.[29] Given an understanding of what happened and why, Trial Counsel could have used that information to obtain meaningful psychological testimony.[30] Provided with this understanding, a psychologist could have supplied the jury with a better understanding of why Daniels acted as he did--impulsively--given his background, experience, and the stress of the particular moment. Daniels' other witnesses, in turn, could have demonstrated that they continued to support and bear sympathy for Daniels in spite of their knowledge of the details of what he had done.

Instead, facing the same jury that had just convicted him of multiple first degree murder with special circumstances, Daniels was forced into the worst possible posture throughout the penalty phase: that of a defendant who was still unwilling to admit what the overwhelming evidence established, who was

---

[29] See e.g., Caro v. Woodford, 280 F.3d 1247, 1257 (9th Cir. 2002) (because the jury has broad latitude to consider "amorphous human factors, to weight the worth of one's life against his culpability[,]" all relevant information must be "unearthed for consideration at the capital sentencing phase").

[30] See id. at 1254-44 (stating that the Ninth Circuit "has held that counsel has an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health" and that this duty is "key to developing an effective death penalty presentation").

still unwilling to provide any explanation for what he had done, and who had not expressed any remorse whatsoever.[31]

No case in which the Ninth Circuit has held that a defendant's Sixth Amendment right to counsel was violated by reason of a breakdown of communications between client and counsel has involved a more clear showing that the breakdown amounted to a constructive denial of the right to counsel itself.[32]

In all of the existing Ninth Circuit cases involving a "breakdown" in communications between counsel and client, the "breakdowns" are attributable, in whole or part, to acts of

---

[31] Not surprisingly, when reviewing Daniels' case, the California Supreme Court found no prejudice by reason of other alleged errors made during the sentencing phase in light of the little relative weight advance in mitigation. Daniels, 52 Cal.3d at 889-90.

[32] See. e.g., Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970) (where defendant was charged with first-degree murder in connection with the death of his girlfriend following a night of alcohol and drug use and a physical altercation between the two, a dispute arose early in counsel's representation of defendant, causing him to refuse to cooperate or to testify at his trial and resulting in the offering of a perfunctory defense and defendant's conviction for first-degree murder); United States v. Williams, 594 F.2d 1258 (9th Cir. 1979) (defendant and counsel moved for substitution of counsel based on incompatibility as to preparation for robbery trial where identity was at issue, and defendant chose to represent himself rather than proceed to trial with counsel with whom he was "at serious odds"); Frazer v. United States, 18 F.3d 778 (9th Cir. 1994) (irreconcilable conflict existed where counsel had called robbery defendant a "stupid nigger son of a bitch" and had threatened to provide ineffective assistance if defendant insisted on going to trial, causing defendant to agree to a trial on stipulated facts); United States v. Moore, 159 F.3d 1154 (9th Cir. 1998) (irreconcilable conflict began when counsel failed to keep defendant apprised of plea negotiations and continued throughout representation as defendant was dissatisfied with counsel's preparation and failure to present an affirmative defense to drug conspiracy and possession charges); Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000) (remanding for evidentiary hearing into whether the relationship breakdown rose to the level of an irreconcilable conflict, where the dispute arose between defendant and counsel as to how to combat fingerprint evidence that was the prosecution's only evidence linking the defendant to the burglary he allegedly committed).

counsel during the course of the representation. In this case, communications did not "break down", but rather never existed. Daniels' refusal to communicate was the understandable reaction of a defendant faced with the death penalty whose right to counsel had been mishandled by the trial judge from the beginning of the proceedings.

The decisions of the trial judge as to selection and removal of counsel led to Daniels' mistrust and the resulting communication failure. The court does not fault Daniels either for the mistrust or for the communication failure. In addition, while it may not be that the acts of Trial Counsel caused the mistrust and communication failure, Trial Counsel was at fault for the failure to do more to overcome it.[33] If anything, Trial Counsel's failure to overcome his inability to communicate with Daniels was more devastating to his capacity to represent Daniels effectively than in any existing case in which a communication breakdown impeded counsel's capacity to render assistance and in which courts presumed prejudice.[34] Daniels' case represents the paradigm case as to why prejudice

---

[33] See discussion infra regarding Trial Counsel's ineffectual efforts to overcome this communication "breakdown".

[34] The courts have presumed prejudice in cases where the conflict between counsel and client resulted in the constructive denial of counsel. See Schell, 218 F.3d at 1026. While the court finds that the conflict here deprived Daniels of any counsel whatsoever, the court nonetheless discusses the harm resulting from the conflict for the purpose of providing a complete record for review, should a reviewing court determine that the conflict did not rise to the level of a constructive denial of counsel and therefore decide to undertake a prejudice analysis. See id. at 1028.

must be presumed. The record indicates that Daniels, at some point, contemplated testifying. Because the record is clear that Trial Counsel never learned Daniels' version of events, Daniels was contemplating testifying without the informed advice of counsel. It is in a case presenting circumstances like these--where the breakdown in communication impeded counsel's ability to provide assistance as to the most basic considerations for a defense--that prejudice must be presumed because it is so likely to have occurred.[35]

Daniels has not shown that there was any other counsel available to be appointed at the time Trial Counsel was selected.[36] For this reason, the court does not conclude that his Sixth Amendment right to counsel was violated during the guilt phase.[37] When Daniels moved to have Trial Counsel replaced for the penalty phase, however, qualified counsel was undeniably available. Because the "conflict" for which Roth had been disqualified had been eliminated by his testimony during

---

[35] See, e.g., United States v. Cronic, 466 U.S. 648, 658-60, 104 S.Ct. 2039, 2046-48, 80 L.Ed.2d 657 (1984).

[36] The court had requested that the record be supplemented with evidence as to whether the trial judge had before it any other possible appointments. No such information was ever provided.

[37] Compare Mayfield v. Woodford, 270 F.3d 915, 925-26 (9th Cir. 2001) (holding that district court did not err in denying a habeas claim for ineffective assistance of counsel at the guilt phase, explaining that "[i]n light of the strong inculpatory evidence presented by the State at trial, we find it unlikely that a competent performance by [defense counsel] would have altered the jury's verdict. . . . By the conclusion of the State's case-in-chief, there can have been no reasonable doubt in the jurors' minds that [the defendant] was guilty of two first degree murders. This may well have been one of those cases that was virtually indefensible.").

the guilt phase of trial, there was no longer a valid impediment to his appointment. The decision not to substitute alternative, available counsel[38] for the penalty phase was erroneous and denied Daniels the "effective assistance of any counsel whatsoever."[39]

B. Ineffective Assistance of Counsel at the Penalty Phase

Daniels' claim of ineffective assistance of counsel succeeds because the court is "unable to conclude with confidence that, absent counsel's errors, [Daniels] would have been sentenced to death."[40]

1. Applicable Law

In ineffective assistance of counsel cases, the Strickland benchmark is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result".[41] As discussed herein under the Denial of Right to Counsel, supra, the Strickland standard has two prongs: the performance prong and the prejudice prong.[42] The performance prong in the penalty phase of a capital case requires that counsel "conduct sufficient

---

[38] The trial judge's error in failing to substitute available counsel at the penalty phase cannot be fairly characterized as a "choice of counsel" question. The court, therefore, does not address it as such.

[39] Schell, 218 F.3d at 1026-27.

[40] Strickland, 466 U.S. at 695.

[41] Id. at 686-87.

[42] See id.

investigation and engage in sufficient preparation to be able to 'present[] and explain[] the significance of all the available [mitigating] evidence.'"[43] The Ninth Circuit has interpreted the prejudice prong of this standard as requiring that "[e]ven in the face of . . . strong aggravating evidence, [the reviewing court] must reverse [the defendant's] death sentence if [it] cannot conclude with confidence that the jury would unanimously have sentenced [the defendant] to death if [defense counsel] had presented and explained all of the available mitigating evidence."[44]

2. Discussion

a. Performance

Strickland requires sufficient communication between counsel and client to enable counsel to develop an adequate defense.[45] Without reference to whether the failure of communication between Daniels and Counsel, in and of itself, represented a constructive denial of Daniels' right to counsel, Counsel's ineffectual efforts to communicate constituted ineffective assistance.[46] Because Trial counsel was unable to

---

[43] Mayfield, 270 F.3d at 927 (quoting Williams v. Taylor, 529 U.S. 362, 393, 399, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

[44] Id. at 929 (citing Williams, 529 U.S. at 368-69).

[45] See Frazer, 18 F.3d at 782.

[46] See Williams, 529 U.S. at 393 (stating that in the sentencing phase of his capital trial, the defendant had a "constitutionally protected right . . . to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer").

overcome the communication impediments, Trial Counsel made multiple mistakes: he failed to learn the content of Daniels' testimony and advise him as to how to offer it, he undertook an inadequate investigation into Daniels' background and mental health, and he employed an ill-prepared, incompetent psychologist whose testimony aggravated rather than mitigated.[47]

Perhaps the key element of Daniels' potential defense at the penalty phase was what a competent psychologist might have been able to say both to explain Daniels' conduct and to provide a context that would make meaningful statements of the dozens of witnesses who described Daniels as a non-violent man who had adjusted to his shooting by police officers and the resulting paraplegia without anger.[48] Any such psychological testimony would have to have been grounded in Daniels' testimony, or at least in knowledge of what the content of Daniels' testimony would have been. At the evidentiary hearing before this court, Trial Counsel acknowledged that he understood how critical Daniels' testimony was: he recognized that the only valid defense strategy was to call Daniels to testify in his own behalf

---

[47] Ainsworth v. Woodford, 268 F.3d 868, 874-75 (9th Cir. 2001) ("counsel's ill-preparation resulted in the testimony of one defense witness . . . whose testimony contribut[ed] to the evidence in aggravation" rather than in mitigation).

[48] See Caro, 280 F.3d at 1254-55 (stating that the Ninth Circuit "has held that counsel has an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health" and that this duty is "key to developing an effective death penalty presentation").

because he had no credible defense to guilt. Even knowing this, he did not press Daniels to share the content of what his testimony would have been or ultimately to testify.[49] He did talk with Daniels and ask him for his account of the relevant events, but he did not explain that because he had no legitimate defense to the government's case for guilt, without his testimony he would have no real defense to the government's case for the death penalty. He did not explain that without Daniels' testimony, any attempt to defend against guilt at the guilt phase was likely to make his situation at the penalty phase worse. He also did not explain that the extent to which the jury would give mitigating weight to psychological or other evidence offered at the penalty phase would be interdependent with his testimony.[50]

Perhaps most importantly, Trial Counsel failed to make use of Roth to overcome his inability to communicate with Daniels. Following his removal, Roth avoided speaking with Daniels about anything related to this case because he feared that such discussions would not be privileged and could therefore be subject to examination when he was called as a prosecution witness. For the same reason, Trial Counsel claimed that he

---

[49] As discussed supra, the record suggests that Daniels, at some point, did contemplate testifying.

[50] See Caro, 280 F.3d at 1257 ("It is significant in considering the impact of the omitted evidence on the reliability of Caro's sentence, that the evidence presented by the defense as mitigation consisted primarily of lay background and character evidence. The only expert testimony presented relating to [defendant's] mental health did not shed light on his brain damage[,]" and instead "tended . . . to paint him as a violent psychopath.").

avoided discussing the case with Roth. Trial Counsel failed to explain, however, why he did not seek information from Roth that might have assisted him in some way in establishing communication with Daniels; indeed, Roth's conveying of information to Trial Counsel would not have posed any risk that Roth would have learned anything he did not already know and about which he could have been subject to questioning as a witness.[51]

Furthermore, Trial Counsel failed to explain why, at the penalty phase, following the elimination of any need for Roth's testimony, he did not make full use of Roth's relationship to overcome the ongoing impediments to his communication with Daniels. When the trial judge denied Daniels' motion to appoint Roth as counsel for the penalty phase, in fact, he suggested that Counsel should seek assistance from Roth.[52] Trial Counsel's

---

[51] The primary reason for the court's concern about not also reversing the guilt phase is that the decision to disqualify Roth was clearly erroneous. Moreover, the effect of the designation of Roth as a prosecution witness was to preclude Trial Counsel from using Roth to facilitate communication between Trial Counsel and Daniels, thereby chilling Trial Counsel's ability to effectively represent Daniels. The trial judge's errors did not end with the guilt phase, as discussed supra and infra. When considering Daniels' motion to re-appoint Roth as counsel for the penalty phase, the trial judge, ignoring Co-Counsel's declaration describing the communication void, insisted that Roth need not be appointed: "I don't see any reason why Mr. Daniels can't fully and fairly disclose anything to Mr. Roth. Mr. Roth, I notice, has taken an interest in the trial and he has been in and out of the courtroom throughout the case. . . . I am sure there can be cooperation between Mr. Roth and Mr. Daniels and [Counsel] in this case whether or not Mr. Roth is appointed by the court to represent Mr. Daniels. . . . If Mr. Daniels wants to confide in Mr. Roth and Mr. Roth [will] consult with his present counsel, that certainly can be done."

[52] See citation to record, supra note 51.

testimony at the federal habeas evidentiary hearing suggested that at some point late in his representation of Daniels, he and Co-Counsel came to view any communication between Roth and Daniels as "militating against our position in attempting to defend [Daniels]." Trial Counsel recalled he and/or Co-Counsel warning Roth to "keep [his] hands off and let's see if we can handle this to the best of our ability." In light of Trial Counsel's admitted knowledge that Daniels' testimony was critical to his defense and his ongoing inability to communicate with Daniels, his failure to use Roth in any way to overcome the communication failure, particularly by the time of the penalty phase when any threat from Roth's designation as a witness had been lifted, constituted deficient performance. [53]

---

[53] See Caro, 280 F.3d at 1255 (stating that where trial counsel conceded he had no strategic reason for failing to investigate the defendant's exposure to neurotoxicants, he had "failed to adequately justify his reasons for not conducting a reasonable investigation and, therefore, rendered deficient performance"). See also Williams, 529 U.S. at 393. Unable to overcome the communication breakdown, Trial Counsel also failed to reasonably design around it. In the face of Daniels' continued silence, Trial Counsel believed that the one defense strategy available to him was to defend against guilt by attempting to create doubt as to whether Daniels was the person who shot the officers. This strategy, however, was the worst possible strategy given the fact that the evidence that it was Daniels who shot the officers was overwhelming and the fact that without Daniels' version of events, Trial Counsel had nothing on which to base such a defense. This strategy, ridiculous in the face of the overwhelming evidence, conferred no mitigation and instead aggravated--because the jury in a capital case renders both conviction and sentence, by adopting this guilt phase strategy, Daniels was likely to face a jury at the time of sentencing that was angry at his attempts to evade guilt and that was therefore more likely to impose death. Even in the face of his inability to communicate with Daniels, selecting such a strategy was ineffectual and in fact was indefensible. See Silva v. Woodford, 279 F.3d 825, 846 (9th Cir. 2002) ("Certain defense strategies may be so ill-chosen that they may render counsel's overall representation constitutionally defective.") (citations omitted).

Fathomable in part by reference to his inability to communicate' with Daniels, Trial Counsel's handling of mental health experts was woefully inadequate. Without explanation, Trial Counsel failed to pursue obvious leads to develop competent mental health expert testimony for the penalty phase, which prevented key mitigating evidence from reaching the jury. Trial Counsel, unfortunately, had delayed beginning preparations for the penalty phase until a few weeks before it began; he therefore moved for a continuance, but the trial judge denied the motion. Only one week before the penalty phase commenced, Trial Counsel requested additional funds for mental health expert testimony. Funds were not granted, however, until more than a month after Daniels had been sentenced to death. While the trial judge's decisions in this respect were erroneous and severely prejudiced Daniels' penalty phase defense, Trial Counsel's decision to delay his investigation and preparation for the penalty phase until it was essentially too late to permit the development and therefore introduction of meaningful mitigation is without explanation or justification.

Prior to declaring its conflict, the Public Defender's Office had corresponded with a psychiatrist who had treated Daniels as part of his paraplegia rehabilitation and who had established a working therapeutic relationship with him. Trial Counsel made no effort to obtain the assistance of this psychiatrist. Instead, Trial Counsel sought the assistance of a different psychiatrist.

That psychiatrist, however, was unable to persuade Daniels to speak with him and suggested to Counsel that he suffered from "paranoid ideation". Trial Counsel never followed up on this psychiatrist's tentative diagnosis.

Trial Counsel did obtain yet another psychologist to provide "impressions" of Daniels rather than a diagnosis or psychological explanation of his behavior in connection with the shootings. This psychologist, unfortunately, lacked the necessary credentials to testify in a death penalty case. Not only was he not a forensic psychologist, but his only experience as an expert witness was providing evaluations of children for child custody cases. Reflecting his lack of forensic expertise, the defense psychologist limited his interview of Daniels to obtaining his history up through the 1980 robbery because "we had to set some priorities. And I decided not to discuss this case with him. . . ." In addition, the defense psychologist limited his evaluation to the administration of a few preliminary screening tests. When the results of one such test suggested the presence of organic brain damage, the defense psychologist attempted but failed to obtain the assistance of neuropsychology experts to conduct further evaluations. Nor did Trial counsel seek further evaluations.[54] This failure was unreasonable, as demonstrated

---

[54] Caro, 280 F.3d at 1255. As mentioned supra, Trial Counsel also failed to follow up on his first psychiatrist's tentative diagnosis that Daniels had paranoid ideations. One of the psychiatrists obtained by Daniels' habeas counsel, in fact, diagnosed Daniels as suffering from a paranoid disorder, explained the relationship between such a disorder and Daniels' family and social history–including the history of mental

by the reports of more extensive evaluations conducted by a qualified neuropsychiatrists in connection with Daniels' state and federal habeas petitions, which suggested the existence of organic brain damage and explained its relationship to Daniels' behavior.[55]

Having learned that the defense psychologist, informed only by the results of preliminary tests and an interview that did not even touch on the events of the present offense, would have nothing of substance to which to testify, Trial Counsel claimed that he explained to Daniels that the defense psychologist's testimony would be "weak," but, he claimed, Daniels had "insisted" that the defense psychologist be called as a witness. Trial Counsel, unfortunately, acquiesced. As a result of the foregoing errors, Daniels never received an examination and conclusive diagnosis by a competent mental health expert, and the jury therefore never heard any mitigating psychological

---

illness in his family, and described how such a disorder could affect his behavior. Trial Counsel also failed to investigate the extent to which Daniels' extensive prescription drug regimen impacted his state of mind at the time of the shootings. Nor did Trial Counsel investigate Daniels' history of cocaine and PCP abuse, whether he had been using any illegal substances at the time of the shootings, or whether such past or present use could have had a negative synergistic effect on Daniels' mental health. As a result of these failures, the jury never heard any of this information.

[55] Dr. Rosenthal, one of the neuropsychiatrists who examined Daniels in connection with his state and federal habeas petitions, suggested that further medical tests should be conducted to confirm his finding of organic brain damage. He also explained that this brain damage, which was likely caused by repeated trauma to Daniels' head and the loss of blood and consciousness following the shooting that rendered him a paraplegic, can cause personality changes--impulsivity, poor judgment, a tendency to become violent. Dr. Rosenthal stated that information regarding the presence of brain damage and conclusions regarding its effects was available at the time Daniels was tried.

explanation of Daniels' behavior. Perhaps most damaging, during direct examination, the defense psychologist introduced the word "sociopath" and opined on whether it applied to Daniels. In addition, during cross examination, the prosecutor's questioning emphasized the defense psychologist's lack of expertise, and more troubling, revealed his total lack of preparation--as seen by his admission that he failed to review all of the background psychological materials provided to him by Trial Counsel.

Not only was the testimony of the defense psychologist so disastrous that Daniels felt too "discouraged" to testify after it, but it also opened the door for the state's expert to testify in rebuttal. The state's expert was everything that the defense psychologist was not. He was a nationally certified psychologist and an experienced, forensically trained, expert witness, whose credentials were vastly superior to those of the defense psychologist. He severely discredited the defense psychologist's testimony by attacking the validity of one of the tests that formed the basis of his opinion. The state's expert went on to state that based upon the information relied upon by the defense psychologist, his own conclusion would be that Daniels indeed was a sociopath, and he provided the definition of sociopath as a "man without a conscience."[56] As a result, the final impression

---

[56] In connection with the evidentiary hearing on Daniels' federal habeas petition, the court appointed its own expert psychologist, who testified that the information available to the psychologists who testified at the penalty

the jury had of Daniels was that he was a violent, incurable sociopath whose attorneys were so desperate that they had to present the testimony of an unqualified and incompetent psychologist.[57] Even before this time, by his own statement, Trial Counsel had given up any hope of obtaining any favorable result in this case and instead was pinning his hopes for Daniels' defense on a motion for a new trial or on an appeal.[58] Trial Counsel later explained that for those reasons and because he wanted to avoid a "battle of experts," he did not attempt to present any rebuttal to the state's expert.[59] Although

---

phase was inadequate and that no reliable diagnosis could be made based on that information alone.

[57] See Ainsworth, 268 F.3d at 874-75 ("counsel's ill-preparation [for the penalty phase] resulted in the testimony of one defense witness . . . [whose testimony] contribut[ed] to the evidence in aggravation[,]" rather than in mitigation).

[58] Trial Counsel's belief in Daniels' chances on appeal was supported by the California Supreme Court's affirmance rate of death penalty cases around the time of Daniels' trial. From 1979 through 1986, the California Supreme Court affirmed only 7.8 percent of the death penalty cases it reviewed. UELMAN, GERALD F., Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts, 23 LOY. L.A. L. REV. 237, 237-38 (1989); KESSLER, C . ELLIOT, Death and Harmlessness : Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases – a Comparison and Critique, 26 U.S.F. L. REV. 41, 43 (1991). By the time Daniels' direct appeal was being considered by the California Supreme Court, however, the composition of the court had changed and the affirmance rate of death penalty cases climbed to 71.8 percent in the years 1986 to 1989 and to 94.2 percent in the years 1990 to 1992. See UELMAN supra. Daniels' direct appeal was denied in 1991.

[59] As the court's appointed expert testified at the federal habeas evidentiary hearing, because both psychologists had relied on insufficient information, they could not offer valid scientific conclusions. Their conclusions were not

understandable, Trial Counsel's decision to essentially abandon any defense was not reasonable.

b. Prejudice

In the penalty phase of a death penalty case in the Ninth circuit, "all relevant information [must] be unearthed for consideration . . . because [t]he determination to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts. The statutory factors give the jury broad latitude to consider amorphous human factors."[60] Although it cannot be said precisely what the content of Daniels' testimony might have been, Counsel's failure to "unearth" it, so as to be able to evaluate it and provide advice as to how Daniels should offer it, along with Counsel's deficient handling of mental health evidence at the penalty phase, undermine the court's confidence in the outcome.[61] The court concludes that the content of Daniels' testimony, and the manner in which other mitigating testimony might have been

---

"expert" opinions, and therefore there was no real "battle of experts". The court's appointed expert explained that instead there had been a battle of forensics. The defense psychologists's lack of credentials and the state's expert's superior forensic training and experience ensured he would win such a battle.

[60] Caro, 280 F.3d at 1257 (citations omitted).

[61] See Strickland, 466 U.S. at 694. See also Silva, 279 F.3d at 834 (stating that the Ninth Circuit has held that cumulative prejudice from trial counsel's deficiencies may amount to sufficient grounds for a finding of ineffectiveness of counsel) (citations omitted).

tailored to it, could have been such that the jury would not have imposed a death sentence.[62]

III. THE DEATH SENTENCE VIOLATES DANIELS' DUE PROCESS RIGHTS

It is axiomatic that a judicial process that violates other constitutional rights of a defendant does not afford "due" process of law. Even if, however, the manner in which Daniels was provided counsel in this case could somehow survive analysis under the Sixth Amendment, the question would be close enough that the same result would be compelled because the cumulative effect of the multiple other errors that occurred throughout the proceedings so infected them with unfairness as to make the death sentence invalid.[63]

A. Denial of Motion to Change Venue (Penalty Phase)

The process by which the proceedings in this case deprived Daniels of his right to due process of law in connection with his sentencing began with the trial judge's refusal to move his trial to another venue despite the extensive pre-trial publicity surrounding the case and the fact that the jurors passed by a

---

[62] See Strickland, 466 U.S. at 694. See also Caro, 280 F.3d at 1257 ("It is significant in considering the impact of the omitted evidence on the reliability of Caro's sentence, that the evidence presented by the defense as mitigation consisted primarily of lay background and character evidence. The only expert testimony presented relating to [defendant's] mental health did not shed light on his brain damage[,]" and instead "tended . . . to paint him as a violent psychopath.").

[63] See Thomas v. Hubbard, 273 F.3d 1164, 1181 (9th Cir. 2001).

statue commemorating slain officers as they entered the courthouse everyday during the trial.[64]

1. **Applicable Law**

A criminal defendant has a right; to be tried by a panel of impartial, indifferent jurors. "Accordingly, a trial judge must grant a motion for change of venue if prejudicial pretrial publicity makes it impossible to seat an impartial jury.[65] This court must conduct an independent review of the exhibits containing news reports about the case to "'determine whether there was such a degree of prejudice against [Daniels] that a fair trial was impossible.[66] Prejudice is presumed as a result of pervasive publicity "when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about; the crime."[67] Among the factors to be considered for presumed prejudice is whether there was a "barrage of inflammatory publicity immediately prior to trial amounting to a huge . . .

---

[64] See discussion of the pre-trial publicity supra note 8.

[65] Ainsworth v. Calderon, 138 F.3d 787, 795 (9th Cir.), amended, 152 F.3d 1223 (9th Cir. 1998) (internal quotation omitted).

[66] Harris v. Pulley, 885 F.2d 1354, 1360 (9th Cir. 1988) (quoting Bashor v. Risley, 730 F.2d 1228, 1234 (9th Cir. 1984)).

[67] Ainsworth, 138 F.3d at 795 (internal quotation omitted). To determine whether actual prejudice existed, the court "must determine if the jurors demonstrated actual partiality or hostility that could not be laid aside." Harris, 885 F.2d at 1363.

wave of passion.[68] The court should also consider whether the media accounts were primarily factual[69] and whether they contained inflammatory, prejudicial information that was not admissible at trial.[70]

2. Discussion[71]

Ample evidence exists that the media reports were not limited to factual accounts of the crimes and that Riverside County "was saturated with prejudicial and inflammatory media publicity about the crime."[72] As indicated by the editorials and the commemorative statue, it also appears that there was a "huge . . . wave of public passion" regarding the case.[73] The nature and extent of the pre-trial publicity in this case, coupled with the fact that the overwhelming majority of prospective and

---

[68] Patton v. Yount, 467 U.S. 1025, 1033, 104 S.Ct. 2885, 2889, 82 L.Ed.2d 847 (1984) (internal quotation omitted).

[69] 69 See Harris, 885 F.2d at 1362.

[70] 70 See Sheppard v. Maxwell, 384 U.S. 333, 360-61, 86 S.Ct. 1507, 1521, 16 L.Ed.2d 600 (1966).

[71] 71 The court was unable to make an independent review of the pre-trial publicity in this case because the news coverage was not included in the record before the court. Instead, the court relies on the findings made by the California Supreme Court regarding the publicity. See 28 U.S.C. § 2254 (d)(1); Sumner v. Mata, 449 U.S. 539, 546, 101 S.Ct. 764, 768-69, 66 L.Ed.2d 722 (1981) (an appellate court can make a finding of fact). While deferring to the state court findings of fact, the district court is entitled to give different legal weight to the findings. See Evans v. Lewis, 855 F.2d 631, 633 9th Cir. 1988).

[72] Ainsworth, 138 F.3d at 795.

[73] Patton, 467 U.S. at 1033

actual jurors recalled actual exposure to such publicity, incline the court to grant the petition on this claim alone, but it need not do so because when considered with other errors, the cumulative effect requires that Daniels' sentence be reversed.

B. Erroneous Jury Instruction

The foregoing errors were compounded by the erroneous jury instruction given by the trial court, which allowed the jury to consider overlapping special circumstances at the penalty phase. During the guilt phase of the trial, the jury found true six special circumstances: two of multiple murder, two of murder to avoid lawful arrest, and two of murder of a police officer. In determining whether to impose the death penalty, the jury w a s instructed that it could consider the special circumstances in aggravation.

On direct appeal, the California Supreme Court held that the second multiple-murder special circumstance was erroneous and set it aside.[74] Accordingly, the jury should have considered only one multiple murder special circumstance at the penalty phase. Daniels argues that the jury's consideration of the invalid special circumstance "skewed the penalty phase weighing process in favor of aggravation and injected an impermissible element of unreliability into the jury's capital sentencing determination." The Ninth Circuit rejected a similar claim in

---

[74] Daniels, 52 Cal.3d at 876.

Williams v. Calderon,[75] when it held that "it is highly unlikely that the jury simply counted up the special circumstances charged and based the verdict on such calculation."[76]

In Daniels' case, the jury was instructed to weigh the aggravating and mitigating factors to determine the appropriate penalty. The jury was not instructed to count and compare aggravating and mitigating factors. When considered alone, this claim would not entitle Daniels to relief.[77] In the context of the other penalty phase infirmities, however, this misleading instruction gave the jury one more improper reason to tip the scales against Daniels. It, therefore, contributes to the cumulative error that requires a new penalty phase proceeding.[78]

IV. CONCLUSION AND ORDER

Everyone involved treated this case as if the result was foreordained. The haste of the proceedings and lack of care taken to protect Daniels' constitutional rights reflected this presumption. Such a presumption, however, is not constitutionally permissible. Indeed, if anything, Ninth Circuit law makes clear that in death penalty cases the constitution

---

[75] 52 F.3d 1465, 1480 (9th Cir. 1995).

[76] Id.

[77] See id.

[78] Daniels also contends that the two special circumstances of murder to avoid lawful arrest were redundant. Daniels, however, provided no legal authority for this argument, and this court, on federal habeas review, will not rule on an unsettled question of California law.

requires that the rights of an accused must be more scrupulously protected. Because the trial in this case was constitutionally deficient at the penalty phase, Daniels' sentence must be vacated.

Accordingly, the court GRANTS the petition for the reasons stated herein. Daniels' claims that are not stated herein as the bases of the court's decision are DENIED. A writ of habeas corpus, therefore, shall issue VACATING and SETTING ASIDE the sentence of death in the case of People v. Daniels, Case No. CR-19711, unless, within 120 days of the entry of judgment herein, the State of California grants Daniels a new penalty trial. If no re-trial is held, Daniels shall be sentenced to life in prison without the possibility of parole.

IT IS SO ORDERED.

DATED: May 23, 2002

/s/
J. Spencer Letts
United States District Judge